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No. 91-1688

In The

Supreme Court of the United States

October Term, 1991

ROBBIE LUCAS,

Petitioner,

vs.

SCHNEIDER NATIONAL CARRIERS, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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REASON FOR DENYING THE WRIT

Futility of Amendment is a trial matter to be determined upon the record before the Court, and as such there exists no inconsistency as between circuit decisions on this matter and no material issue for review by this Court.

I.

Futility, is futility, is futility. Haggling over the definition of "futility" is an exercise in futility itself, certainly an unnecessary task for the Supreme Court of the United States. Such an exercise is indeed inappropriate for it neither (1) presents an important question of law, nor (2) involves any public policy interest, nor (3) results from a material inconsistency between decisions rendered upon the same issue by United States Circuit Courts of Appeal.

Petitioner would have this Court believe that there exists some grave inconsistency between circuits as to when to deny a motion to amend on grounds of "futility." Specifically, the petitioner suggests that once and for all this Court must make a final determination as to whether to define "futility" in terms of a Federal Rule of Civil Procedure 12(b)(6) or summary judgment standard. In furtherance of this proposition, petitioner has cited several cases from numerous jurisdictions which have purportedly defined "futility" in an inconsistent manner.

Upon closer examination it is clear that these courts have rendered perfectly consistent decisions. The determination of "futility" as it relates to a specific motion to amend is to be determined not upon a universal set standard, but instead upon the individual record before each court. That is, if a motion to amend is offered to combat a 12(b)(6) motion, such courts have properly looked to see if the amendments, if granted, indeed state a claim upon which relief may be granted. If so, the motion to amend should be granted. If not, the motion for leave is futile and properly denied. Likewise, if before the court the record contains a motion for summary judgment, the court must duly determine whether such amendments would survive the summary judgment attack. If not, they are undeniably futile and the motion must be denied. To allow an amendment under these circumstances would be an idle waste of judicial time, energy and client resources

for such additional claims would immediately henceforth fail. Quite simply, it is this approach which the Circuit Courts of Appeal have applied, for to act under any other methodology would clearly result in mass judicial waste. As the Fifth Circuit aptly stated, "[w]hen a Complaint, as amended, would be subject to dismissal, leave to amend need not be granted." Rule 15(a) does not require that courts indulge in futile gestures. *DeLoach v. Woodley*, 405 F.2d 496, 497 (5th Cir. 1968), citing *Foman v. Davis*, 371 U.S. 178 (1962).

For instance, taking two cases the petitioner contends as having resulted in an "inconsistent" application of futility, it is clear upon a reading of the full opinion in each that the decisions rendered are completely consistent, not only with one another, but also with the decisions of this Court, and the decisions of other circuits. Thus, there is simply no issue properly presented to this Court for review. In *S. S. Siblerblatt, Inc. v. East Harlam Pilot Block*, 608 F.2d 28 (2d Cir. 1979), the Second Circuit properly looked to the record before the court, which at the time leave was filed included only the complaint, and granted the movant's motion to amend upon finding that it stated a claim upon which relief could be granted. Obviously, a 12(b)(6) standard was applied because the defendant had not yet filed a responsive pleading. Similarly, in *Addington v. Farmer's Elevator Mut. Ins. Co.*, 650 F.2d 663 (5th Cir. 1981), the record included a motion for summary judgment when the movant's leave to amend was filed. As a result, the court properly denied leave after finding the proposed amendments would not survive the summary judgment attack. Such was the same result in the case *sub judice*.

The petitioner in this case was a trespasser in the respondent's truck on April 8, 1988. That issue has been duly determined at both the trial and appellate levels and is not at issue here. As such, the only duty owed her by the respondent was to avoid willful or wanton injury. *Ball v. Whitaker*, 342 S.W. 2d 67 (Tenn.

1960); *Reynolds v. Knowles*, 206 S.W. 2d 375 (Tenn. 1947). At the time the petitioner filed her motion to amend to include additional claims of simple negligence, the record before the court included the respondent's motion for summary judgment. At the subsequent motion hearings, District Judge Jordan duly considered both motions. Upon finding the petitioner's proposed amendments insufficient to overcome the respondent's summary jujdgment motion, Judge Jordan properly sustained the respondent's motion for summary judgment and denied as futile the petitioner's motion for leave to amend (R27). Naturally, the Court of Appeals for the Sixth Circuit affirmed and found no abuse of discretion (R31).

CONCLUSION

The determination of whether a motion to amend should be denied on grounds of futility must be based upon the individual record before the court, not a set uniform standard as suggested by the petitioner. Therefore, "futility" depends upon the purpose for which the motion was proffered. As such, the cases cited by the petitioner as "in conflict" with one another are indeed quite consistent, as the decisions rendered therefrom are based upon the record presented in each case. As follows, there is no material issue for review by this Court. Respectfully, the petitioner's writ should be denied.

Respectfully submitted,

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